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International competition agreement as a part of WTO?

I. Introduction

Modern business operates in quite unique environment. On the one hand it is highly economically integrated, but on the other still politically, culturally and legally diverse. Despite the effect of globalisation law and politics is still organised in general on the basis of nation-states. Saying that we have to recognize also a fragmented international regulatory environment that has evolved, where each government has developed its own unique approach to the regulation of conduct that affects its territory and suits the best the specification of that territory, often without regard to the effect of that regulation on the other nations.

Antitrust law (known in Europe as competition law) is one form of such a regulation. It is defined *sensu stricto* as a law that promotes or maintains market competition by regulating anti-competitive conduct[1]. This regulation however has an effect only within the boundaries of a nation-state unless it has significant domestic effects. The limited territorial approach has created difficulties in the increasingly globalised world in which transactions are held over multiple nation-states territories. As a result while competition law remains national in general, competition issues have become increasingly international creating a disjunction of regulation. As a result we may end up with either under- or over-regulation of competition related phenomena. In the first situation anti-competitive conduct may not be prevented due to ineffective regulation, particularly as firms have every incentive to structure their arrangements to arbitrage cross-border regulatory differences. In the second situation regulations of two states cross over each other letting a so-called forum shopping to occur.

For this reason countries have sought to negotiate bilateral agreements in relation to co-operation in competition issues. Despite the fact that those agreements are of great assistance, they also have clear limitations. As a result nation-states started to take into consideration the possibility of negotiating a multilateral agreement on competition law. The first attempts to create such an agreement were made in 1945 in

[1] There is number of definitions of competition law. This one was chosen because of its wide range of use and simplicity.

negotiations preceding the adoption of the General Agreement on Tariffs and Trade (GATT). Limited international competition obligations where proposed. In 1994 with conclusion of GATT Uruguay Round of Negotiations the World Trade Organisation (WTO) was created. The agreement establishing WTO had included a range of limited provisions concerning competition issues. In 1996 a formal WTO Working Group on Interaction Between Trade and Competition Policy was established by a WTO Ministerial Conference in Singapore. The WTO Working Group has investigated various issues relating to the incorporation of competition law and policy into the WTO. Other organisations, such as the World Bank, the OECD and the International Bar Association, have also contributed to the analysis under a variety of different initiatives. It proves clearly that international competition issues have now a prominent position on the international trade policy agenda.

The purpose of this paper is to explain if such an international agreement or a model law is necessary and possible in current political international situation. In order to do that we need to answer a series of questions: Is competition law at all beneficial? Do we need an international competition agreement? Is such an agreement politically possible? Is the WTO a suitable institutional vehicle for such an agreement?

II. Is competition law at all beneficial?

To answer this question it is necessary to quote the most important concepts of neoclassical microeconomic theory as they apply to rationale of competition law. The terms of market[1], the perceived benefits of market efficiency, the role of competition[2] and the relationship between those two are the key to understand the formation of competition law. The most important assumptions are the following:

- Market allocates scarce resources between competing and users;
- Competition enhances market efficiency[3];

[1]Here understood as: an abstract concept describing the range of actual and potential transactions between producers and consumers.

[2] The primary attribute of competition, is the "tendency" to eliminate profit or loss, and bring the value of economic goods to equality with their cost – F. Knight, *Risk, Uncertainty, and Profit*, Boston 1921.

[3] Economic efficiency refers to the optimal use and allocation of such resources by markets, thereby maximizing social welfare.

- Market power is a threat for competitive processes;
- Competition law regulates market power in order to promote competition and as the result enhancing economic efficiency[1] and increasing social welfare.

The whole mechanism bases on the empirically justified behavioural assumptions that producers will seek to recover their long-term costs while individually optimising production to maximize their profits[2] and that customers will seek to maximize their individual utility by purchasing the products they most value at the lowest available price. This leads us to Marshallian equilibrium market[3] where the level of supply meets the level of the demand in such a way that equilibrium number of market transactions occurs.[4] In the equilibrium market economic efficiency is at its peak, because products are produced at the minimum possible total cost with available technology (productive efficiency) and suppliers allocate products to those consumers who will to pay the most maximising the welfare of both customers and producers. The arising question is what drives the customers and producers to the equilibrium market effect? According to neoclassical economists it is competition. Producers with the lowest production costs will have the highest initiative to produce and customers who value product the most will have the highest gain in customers' surplus and therefore the greatest initiative to consume. Competition between producers to gain customers will ensure that products are offered at an equilibrium price that ensures the balance between production costs and customers' willingness to pay.

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[1] The concept of efficiency in its classic meaning is "Pareto efficiency", which refers to a situation where it is impossible to relocate resources in such a way that the welfare of one person would rise without decreasing welfare of anyone else. However in this case the "Kaldor–Hicks efficiency improvement" is more suitable. This concept refers to a situation of relocation of resources where those gaining welfare could hypothetically fully compensate those loosing welfare, yet still benefit from net welfare improvement.

[2] Producers maximize their profit by producing to a point where marginal revenue contributed by each additional unit no longer covers marginal production cost.

[3] See: A. Marshall, *Principles of Economics* (1890).

[4] The equilibrium market has two effects: it allocates supplies to those producers who use the least resources and it allocates consumption to those customers that value products the most.

It is a case in a perfect market, which does not exist in a real world, because in practice markets have always structural weaknesses that disallow their efficient outcome including imperfect information and imperfect competition.[1] For this reason economists have developed the theory of "Second Best".[2] What is important in this theory from competition policy point of view is the observation that imperfections occurring in one market may change equilibrium conditions in other markets. In other words, the policy-makers face a dilemma, because intervention to correct one market may lead to worsen of situation in other markets[3].

Conclusions drawn from this theory lead to the problem of competition law regulation. The most basic justification of it is that without governmental intervention competition would be sub-optimal and, as a consequence, markets would not operate as efficiently as they otherwise could. The optimal degree of regulation is however very controversial and led to development of a number of competing schools of thoughts. For example, the "Chicago School" favours minimal regulatory intervention, while "Harvard School" has recommended greater intervention[4].

The competition law is intended to regulate market power. Market power of a company is defined as an ability to profitably maintain prices above competitive levels for a significant period of time[5]. Therefore it regulates not only the use of existing individual market power ("antimonopoly laws"), but also the merger of market participants ("merger laws") and acquisition of collective market power by its participants ("concerted conduct laws")[6].

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[1] See: R.H. Coase, *The problem of social costs*, (1960) 3 Journal of Law and Economics 1.

[2] See: R.G. Lipsey and K. Lancaster, *The General Theory of Second Best*, (1956) 24 Review of Economic Studies 11-24.

[3] Modern regulatory theory bases on the "cost-benefit" ranking of policies that shows their potential of maximizing "Kaldor-Hicks efficiency improvement" – see: discussion in J. Bhawgati (ed), *Trade, Balance of Payment and Growth*, New York 1971.

[4] See: R.A. Posner, *The Chicago School of Antitrust Analysis*, (1979) University of Pennsylvania Law Review 935.

[5] See: „Mexico – Measures Affecting Telecommunications Services", WT/DS204/R, Report of the WTO Panel, 2 April 2004, para.7.153

[6] See: M. Taylor, *International Competition Law*, Cambridge 2006, Chapter 4.

In monopolised market a company with substantial market power will be able to influence a price as a result of its production, being a significant part of market supply, and therefore will be less subject to competitive constraints imposed by rivals. As a result they will be able to reduce production to such a level where the net profit will be the highest for them. Such a behaviour leads to diversion of welfare from customers to producer and to a deadweight loss in social welfare. The principle of optimal scarce resources allocation is violated in this case. In 1954 it was calculated by Harberger that loss of allocative efficiency associated with monopoly pricing in US economy was as low as 0.1% of Gross National Product (GNP)[1]. This argument is often used by some authors who are against antimonopoly regulation[2]. However, what they do not mention is that welfare losses arise not only from allocative efficiency losses but also from poor behavioural initiatives of monopolist to reduce costs, known as "X-efficiency" and technical inefficiency. Scherer and Ross have calculated that likely technical efficiency costs of monopoly pricing to the US economy were between 4 and 12% of GNP[3]. Antitrust laws do not directly regulate monopoly pricing. They regulate and prevent unfair market power gains that may lead to such practises, they try to minimise the scope of welfare losses mentioned above by controlling companies with substantial market power and preventing them from unfairly using their position[4]. In the light of this evidence it is possible to conclude that competition law stimulates competitive economy and is therefore beneficial.

III. Do we need an international competition agreement?

In recent years business transactions around the globe became significantly more international. What is more nowadays the problem of national classification of companies whose property and production is spread in many countries is a matter of a live scientific dispute[5]. In year 2000 world trade as proportion to global production became 34% and that

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[1] See: A. Harberger, *Monopoly and Resource Allocation*, (1954) 21 Economic Review 77.

[2] See: D.T. Armentano, Antitrust: *The case of rappel*, Washington D.C. 2001.

[3] F.M. Scherer and D. Ross, *Industrial Market Structure and Economic Performance*, New York 1990, p. 678.

[4] By, for example, dumping prices, impeding market entry, and so on.

[5] See: dispute about foundation and seat theory in: Jacek Gołaczynski, *Prawo prywatne miedzynarodowe*, Warszawa 2003, p. 103

tripled its share since 1970[1]. This evidence shows that interests of business representatives are increasingly international, while competition law is still being enforced locally and focuses on interests of single national states disregarding the effects it will have on other markets. As a result of this as well as of territorial application of competition regulations some situations occur where we may talk about under- or over-regulation.

Under-regulation occurs either where the coverage of domestic competition law is incomplete so the anti-competitive conduct is not regulated or the anti-competitive conduct is regulated, but the level of regulation is below the globally optimal level. For example an export cartel is permitted by the nation-state regardless to cartel restriction of goods and/or services supply to other countries, which leads in certain circumstances to welfare reduction to global community[2].

Over-regulation occurs where one or more competition laws impose a level of regulation above the globally optimal level, including situations where the domestic competition laws overlap. For example one nation-state may block a cross-border merger that has a negative effect in its own economy even though it may be beneficial for other nations increasing net benefit of global welfare. Importantly over-regulation has two other effects. It may lead to increased transaction costs for companies engaged in international transactions and system frictions. High transaction costs are especially disadvantageous for mergers and acquisitions, because companies have to literary push through different layers of jurisdiction, what causes significant time delays, leading often to transaction abandonment[3]. System frictions occur where two or more competition laws overlap, leading to inconsistent results and potential jurisdictional conflict. In some cases frictions become highly politicised and lead to destabilisation of diplomatic and trade relations between countries. From the long list of examples[4] probably the most famous is the McDonnell

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[1] OECD, "Investment patterns in Longer-Term Perspective", Paper on International Investment No. 2000/2, Paris 2000.

[2] The adverse spillover effect on other nation-states from export cartel overweight the benefits of a nation permitting a cartel.

[3] On the issue of time sensitivity of mergers and acquisitions see: United States Department of Justice, "International Competition Policy Advisory Committee Final Report", Washington DC 2000, ch. 2.

[4] Such as: Ford & Mazda, Compaq Computers & Tandem Computers, Price Waterhouse & Cooper and Lybrand, GE & Honeywell (unsuccessful), MCI & Worldcom

Douglas & Boeing merger from 1997[1]. In this case merger involved $16 billion acquisition of McDonnell Douglas by Boeing Company, which is the greatest competitor of Europe based Airbus Industrie consortium. The Federal Trade Commission (FTC) approved the merger as it was necessary for long term survival of McDonnell Douglas as a competitive company. Although the merger took place in US it had adverse effect on EU market, because both companies had European operations. As sales of Boeing and McDonnell Douglas exceeded the thresholds of the EU merger regulation, the EC decided that it has jurisdiction over the merger based on effects in EU market. The EC then accused FTC of strengthening Boeing's dominant market position at passenger planes market[2]. Although the whole conflict emerged from regulation differences of vertical agreements in EU and US the whole matter was highly politicised. The hotline between President Clinton and the President of the European Commission was established. EC not being able to directly block the merger threatened to impose extra taxes and penalties on Boeing if the merger took place. Meanwhile, US diplomats warned of trade sanctions if EU did not capitulate to US interests. American politics viewed the position of EU as the one, which secured the interests of Airbus and disregarded the interests of international aircraft customers[3]. Eventually the political tension was warded off when Boeing negotiated a package of remedial measures with the EC, including modification of long-term supply contracts, patent sharing agreement and the continued separation with McDonnell Douglas until 2007[4].

However, what is ironic, USA was the first country which sought to apply its antitrust laws on exterritorial basis to regulate foreign anticompetitive behaviour which had a negative effect on US domestic market. In general, laws established by one state should oblige on the territory of that state. However the international jurisprudence allows some exempts under the condition of substantial and genuine connection between the subject matter of the claim of jurisdiction and the reasonable legitimate interest of the nation seeking to exercise jurisdiction[5]. Another requirement is that the claim does not interfere with the legitimate affairs

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[1] www.ftc.gov/opa/1997/07/boeing.htm (20th January 2007)

[2] Boeing/McDonnell Douglas, EC Case No. IV/M.887.

[3] See: E. Fox, *Lessons From Boeing: A Modest Proposal To Keep Politics Out of Antitrust*, Antitrust Report 1997.

[4] Boeing/McDonnell Douglas, EC Case No. IV/M.887.

[5] Barcelona Transaction Case (1970) ICJ Reports 248.

of the nation in whose territory claim is made[1]. This is a very fragile matter of intervention within a scope of nations sovereignty and therefore should be very balanced and used only in extremity. Unfortunately USA tries to push this concept to the limits of international acceptance. The results of this policy are pictured in Westinghouse Electric Corporation Case[2]. In this case Westinghouse Electric Corporation was sued by 27 electricity providers for breach of contract in relation to its failure to fulfil fixed-term uranium supply contracts for number of nuclear plants. In its defence Westinghouse Electric Corporation concluded that its contracts were incapable of performance because of uranium shortage and steeply rising prices[3]. For this situation Westinghouse blamed the cartel of 29 domestic and foreign uranium producers and commenced litigation in the US District Court, alleging violation of US antitrust laws. During trial the foreign defendants refused to recognise the jurisdiction of US courts. The US Seventh Circuit Court of Appeals entered default judgements against absent foreign defendants, permitting Westinghouse to calculate its financial loss[4]. What made this case special was the fact that this cartel was established as an answer to US Atomic Energy Commission's protectionistic closure of US domestic uranium market to foreign uranium producers[5]. The foreign producers had no other alternative but to form a cartel in order to fight with US trade boycott. What is more, governments of Australia, Canada, South Africa and Great Britain encouraged the formation of this cartel to stabilise world uranium prices. In this context US behaviour challenged the sovereign right of those countries to determine their own domestic policies. As the answer to that each of those four nations has developed new laws that were of block exterritorial jurisdiction asserted by US courts[6]. However, this reaction created a greater scope of system frictions. This case clearly illustrates that the exterritorial application of antitrust laws creates an international tension. As a result the most powerful nations who are in position to withstand the tension, especially US, apply their domestic competition laws on

[1] Ibidem.
[2] Rio Tinto Zinc Corporation v. Westinghouse Electric Corporation.
[3] Indeed prices of uranium between 1975 and 1978 had doubled.
[4] Eventually claims of Westinghouse against those foreign defendants were settled via million dollar payment and cut-price uranium ore deliveries.
[5] At his point of time US market represented approximately 70% of global market.
[6] See: Australian Foreign Proceedings Act (1984).

exterritorial basis. It is definitely not a situation where global welfare is enhanced. The most powerful state grounds its position and increases a welfare distance between itself and others using political and economic pressure. For this reason it would be beneficial if an international agreement was reached, because it would help to deal with systems friction as well as even up chances of all states to some extent and therefore enhance competition, which would lead to net gains in global welfare as proven in section 1 of this paper.

IV. Is international competition agreement politically achievable?

As stated above different states have different principles of their competition law and policies, based on political, cultural and economic reasons. They also have different goals and expectations towards antitrust regulation. The good example of this matter is that USA arguably tends to emphasise the economic efficiency, while EU competition law has a stronger tendency to favour distributional fairness and social equity. Single governments decide how to redistribute goods within the society primary via taxation and social welfare handouts. It is mainly a political matter[1]. However competition policy designed to promote economic efficiency may often incorporate secondary distributional objectives. Those objectives may appear in following three forms:

- "Customer – customer equity" where welfare is distributed evenly between all groups of customers. In seldom cases competition law may grant provisions to benefit just one particular customers group disproportionately.
- "Producer – producer equity" where welfare is evenly distributed between different types of producers. Competition regulations may protect a certain groups of producers, for example small and medium-sized companies, even though it may be welfare reducing, but for example guarantees high employment rate.
- "Producer – customer equity" where welfare is evenly distributed between producers and customer. Here again governments may permit customers collective bargaining or trade off customers welfare for producers welfare by permitting greater market concentration.

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[1] On welfare redistribution and social welfare theories see, for example: J. Rawls, *A Theory of Justice,* Cambridge 1971; R. Nozick, *The theory of Rationality*, Priencton 1993.

This clearly shows that given the different political options and different conditions of national economies it is impossible to reach a "hard law" world competition constitution that would be binding for all nations worldwide. For this reason it was agreed that such an international agreement should based on the same principals as WTO. That is why, when draft of WTO competition agreement[1] was proposed, it emphasised three principles of:

- Building on bilateral agreements;
- Recognition of differences between countries;
- Selective convergence.

Bilateral agreements are the easiest form of international agreement. They are very flexible which helps to reach a consensus between the parties that differ greatly from each other. It is also a step towards more sophisticated plurilatelar or multilateral competition law agreements[2]. Such forms of agreements allow smaller or bigger clusters of nations to reach a consensus and to gradually harmonize competition laws and reduce political frictions. Bilateral agreements are complementary to plurilatelar and multilateral initiatives and each initiative can be undertaken parallel to others and accelerate progress with the other[3]. Concerning international competition agreement it could be organized in following way: multilateral would establish core principles and draw broad objectives and minimal degree of standardization. Plurilateral agreements would make principles more detailed by adding more specific laws and policies and bilateral agreements would provide clear rights and obligations of the parties ensuring effective cross-border enforcement[4].

At present roughly three-quarters of WTO members have announced themselves as Developing Countries and they represent around one-third of world trade. Those countries had claimed that trade law disproportionately benefited developed countries and therefore wanted "special and different treatment", which was granted to them by GATT. The international competition agreement should also follow this principle.

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[1] www.wto.org/english/thewto_e/minist_e/min05_e/draft_text5_e.doc (26th January 2007).

[2] T. Lampert, *International Co-operation among Competition Authorities*, 20 Competition Law Review (1999)214.

[3] UNCTAD Code recognizes this complementarily and promotes simultaneous initiatives at national, regional and international level.

[4] See: C. D. Ehlermann, *The International Dimension of Competition Policy*, Fordham Law Journal 833 (1994).

Developing countries should be given greater flexibility, greater technical assistance, special concessions and longer implementation periods. They also should be given "opt out" ability provisions that would recognize the fact that Developing Countries have less sophisticated and less well resourced institutions or have no competition law at all[1]. It is important to primarily take into consideration interests of this group of countries because they may play a key role in blocking an international competition agreement.

As for the topic of convergence it is important to understand two key points. Firstly, harmonising competition laws on policy issues is very difficult and would be done at a very high cost, which would probably exceed the benefits. Secondly, such a harmonisation would ignore differences between different countries and would be therefore sub-optimal. For those reasons it is important that the international competition agreement focuses selectively on key elements of law that would benefit most from greater convergence.

For reasons mentioned above it becomes clear that economy in different parts of the world varies greatly and therefore different nations have different interests, which can cause political frictions. That is why it is very difficult to reach an agreement on competition. WTO has proved that a large multilateral consensus on trade was possible and it has shown a way to international competition agreement of negotiators. If they follow this way such an agreement is possible.

V. Is the WTO a suitable vehicle for an international competition agreement?

To answer this question it is necessary to examine the relationship between trade and international competition laws and if they are complementary. In order to do that it is necessary to compare the objectives, theoretical basis and methodology of international competition law and policy and trade law and policy first.

Both trade and competition policies have in many cases the same goal concerning efficiency objective and distributional objective. As for efficiency objective both policies are consistent and strive to improve total

[1] See: A. Krueger, *The Developing Countries and the Next Round of Multilateral Trade Negotiations*, 22 World Economy (1999).

economic welfare in absolute terms by enhancing economic efficiency[1]. However, while competition policy promotes behavioural regulation and market deregulation to achieve its goal, trade policy uses trade liberalisation. As for distributional objectives both policies attempt to improve global and national welfare but using different means. To achieve its goals trade policy uses "fair trade"[2], which include such wide variety of objectives as environmental protection, prevention of labour exploitation, preservation of human rights and transfer of welfare to third world countries. Technically speaking, they mean an exception to one or more WTO obligations[3]. On the other hand competition policy uses "fair competition" mentioned previously in this paper to redistribute global welfare[4].

Although trade and international competition policies have numerous similarities, the legal applications demonstrate substantial differences. They are to be seen mainly in three areas of:

- Subject of regulation;
- Methodology of regulation;
- International justification of regulation.

The differences in subject of regulation indicate a key point of divergence between international competition and international trade laws. The latter seeks to remove discriminatory activities to international trade, bind governments to their tariff commitments and to prevent governments from utilising various types of non-tariff barriers to trade. On the other hand international competition law seeks to promote the adoption of such competition laws that reduces anti-competitive cross-border behaviour. In this manner international trade law is intended to regulate public conduct and market structure, while international competition law is intended to regulate private conduct and market behaviour.

A distinction mentioned above has a great impact on methodology of regulations by both laws. International competition law applies legal obligations to governments that require those governments to modify their

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[1] Word Bank, "Competition Policy In a Global Economy: An interpretative Summary", Washington D.C, 1998, ch. 2.

[2] See: J.N. Bhagwati and H.T. Patrick, *Fair trade and harmonization: Prerequisites for free Trade?*, Cambridge, 1996

[3] For example: Art. XX of GATT, which provides a general exception to the GATT for animal protection.

[4] See: M.J. Trebilcock, *Competition Policy and Trade Policy: Mediating the Interface*, 31 Journal of World Trade (1996).

internal law so that it regulates private conduct. The application of international competition law is therefore indirect. On the other hand the regulation of international trade law is directly targeting governments to achieve its goals. For this reason any international competition obligations would need to be addressed only to governments and not directly to private subjects.

The justification of regulation of trade and competition at international level seems to be very similar. Trade regulation is justified on the basis of that if the nations were to act entirely on in their own interest[1], the optimal results would rarely (if ever) achieved not only from global but also from national perspective. International trade law not only enables individual countries to adopt trade policies, but also tries to prevent barriers to trade enacted by governments acting in their own political interests, which may result in significant spillover effect for other nations exporting goods and services into that nation[2]. An international regulatory approach is therefore justified on the basis that domestic regulation is not sufficient to maximize global and domestic welfare, for the reason of that each government acts in its own political interest which often is contradictory to national and global welfare enhancement. The justification of international competition law also bases on the concept of government selfishness and insufficiency of domestic regulation in order to achieve optimal results. Governments may over- or under-regulate cross-border anticompetitive conduct and thereby creating adverse spillover effects on other states. The current solution of under-regulation, the extra-territorial application of competition laws, can cause political tension and destabilize harmonious international relations. The important difference between trade and competition laws is that trade law focuses on national and global welfare while competition law puts impact on global welfare enhancement only. Practically it means that it allows a potential situation where some nations suffer welfare loss, while other nations have a welfare gain and net global welfare is raised[3]. This means a conflict of interest between nations, so in order to achieve an international agreement

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[1] Under interest the political interest is understood in this case, because long-term economic interest is based on total welfare growth, which is promoted by international trade and competition laws.

[2] See: OECD, "Strengthening the Coherence between Trade and Competition Policies: Joint Report by the Trade Committee and the Committee on Competition Law and Policy", OECD Documents, OECD/GD (96).

[3] Kaldor–Hicks efficiency improvement

welfare gaining nations will have to compensate adequately to welfare loosing ones.

The evidence shown above clearly indicates that while international trade and competition polices are similar in many cases, international trade law and international competition law have several fundamental differences. However it is also a fact that both disciplines coincide in some points of their regulatory approach. First both laws and policies have the effect on increasing domestic competition and second they have an effect of promoting opportunities for increased international trade. What is more some regulations of one of those disciplines can cover the objectives of the second discipline which are not regulated by that discipline. The best example of it is The Kodak–Fuji Film Case[1]. It involved a claim for WTO dispute settlement brought against the Japanese government by US Government office of the Trade Representatives in name of Kodak, which alleged that certain measures taken by the Japanese government allowed Fuji Photo Film to impede access by Kodak to Japanese distribution system of photographic film and paper. Before US lodged its case in WTO, it had first tried to settle a problem using Japanese domestic competition law. The Japanese Fair Trade Commission investigated Fuji's behaviour and concluded it was not against Japanese Antimonopoly Act 1947[2]. US could not use its own antitrust law[3] on extraterritorial basis because the claim involved effects in Japanese market and not in US domestic market. For this reason US lodged a claim for dispute settlement before the WTO[4]. The US based its claim on following legal grounds: US claimed that Japan failed to provide national treatment to imported products, in that US Kodak has been treated unevenly with domestic Fuji film. Such behaviour according to accusation was a direct violation of Article III.4 of the GATT[5], as well as "nullification or impairment " of

[1] http:/internationalecon.com/fairtrade/fairpapers/ddaniels.htlm (25th January 2007).

[2] See: Japan Fair Trade Commission, "Survey of Transaction Among Firms Regarding Photographic Color Film for General Use", July 1997.

[3] Fuji had breached section 301 of the United States Trade Act of 1974.

[4] See: "Japan – Measures Affecting Customer Photographic Film and Paper", Request for consultation by the US, WT/DS44/1, G/L/87.

[5] Art. III.4 states: "The products of the territory of any contracting party imported into territory of any other contracting party shall be accorded treatment no less favorable to than that accorded to like products of national origin in respect of all

WTO tariff concession under Article XXIII.1(b) of the GATT ("Non Violation Complaint"). The US claim was finally turned down[1], but it was the first attempt of using international trade law regulations to solve international competition issues. It has proved strong influence of both disciplines at each other but it has also shown that they are not perfectly complementary.

For the reason of common goals of both disciplines as well as numerous similarities WTO could provide a suitable institutional vehicle for an international competition agreement. However the *sine qua non* condition is that the relationship between competition and trade were suitably reconciled.

VI. Conclusion

Although heavily criticised by some authors, competition law (as proven by economic theoretical models) enhances economy growth and net global welfare and is therefore beneficial. As it focuses on net global welfare and not on domestic national welfare it leads to Kaldor–Hicks efficiency improvement. In practice it means that some states may loose net welfare while other gain it in a proportion that ensures net global welfare gain. That leads to political frictions, because governments take into consideration short-term interests, especially political interests and not long-term economic interests. That is why it is a key matter to ensure that gaining nations will compensate loosing nations their welfare loss. During negotiations of international competition agreement also diversities of economy in different lands have to be taken into consideration. Especially the special conditions are required for developing countries that should be granted some exemptions from some parts of such agreement.

Is such agreement useful and beneficial at all? The answer to that question is positive. The issue of business activities has become global and competition law is still a national-state matter. As a result of this disharmony there is a problem of under- and over-regulation that may cause disharmony at international relations as well as political pressure and blackmail from most powerful countries, which increases the differences between the wealthiest and poorest countries even more. What

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laws, regulation and requirements affecting their internal sale, offering for sale, purchase, transport or use"

[1] See: WTO Panel Report on the film case.

is quite ironic, developing countries are the most distrustful concerning the international competition agreement, even though well constructed agreement would be most beneficial exactly for those countries. To gain their trust it is desirable to leave a negotiation of an agreement to an organization that has a high level of trust of developing countries and is involved competition related activities. The WTO would be perfect for this role for three main reasons Firstly, trade law tries to achieve basically the same principals as competition law. Secondly, WTO at the beginning was seen as a tool in hands of developed countries to grant their superior position, which later has been changed. Thirdly, WTO has an umbrella organization status, which allows a very high level of flexibility. For those reasons I personally think that WTO has a unique chance to expand its actives onto international competition and maybe one day of becoming a World Trade and Competition Organization.